In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant and Cross-Appellee.

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,

Appellee and Cross-Appellant.

Upon Appeal and Cross-Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Summary of Brief of Appellee and Cross-Appellant

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I.

FACTS

We first correct and supplement appellant's statement of the case in four important groups of facts. (Br. 4-11).

II.

We next set out the verbatim opinion of the Supreme Court of Washington, (p. 11), being the last (and only) expression of that court on the question of how to inter-

pret an ambiguous term in a rate tariff in which the rule is announced after an examination of I. C. C. authorities (p. 14):

> "In interpreting the tariff, the terms used, when they are not defined therein, should be taken in the sense in which they are generally understood commercially."

This *rule* as distinguished from the *application* thereof to the facts as they appeared in the record made before the Department of Public Works, is not only persuasive but, we submit, binding in a subsequent suit involving the interpretation of an ambiguous term in a tariff. The *application* of the rule is not *res adjudicata,* for new evidence may be introduced before the trial court in a suit to recover the amount awarded. It is for the trial court to instruct the jury as to what the rule is, and to direct the jury to *apply* the rule to the facts as they find them from the evidence. But in determining what the rule is, the trial court may properly look to what the Supreme Court of Washington says the rule is and adopt that as the rule to be applied by the jury.

The case of *C. M. & St. P. & C. R. Co. v. Campbell River Mills,* 53 Fed. (2d) 69, merely held that the *application* of an unambiguous rate tariff was not *res adjudicata* in a suit to recover the amount of the award of the Department of Public Works. This was clearly correct, because the trial court had a right to receive evidence *de novo,* and the *application* of the tariff made by the Department and the Supreme Court of Washington to the facts as they appeared before the Department would not necessarily be the same as the *application* of the tariff to the facts as they appeared before the trial court. The tariff in that case was unambiguous and presented no question as to the meaning of the tariff rate. It presented only the question of the application of a tariff rate of known meaning. The case did not hold that the federal court should not be required to look to the rule of the state

in ascertaining the meaning of an intrastate tariff. (See Br. 17, 60-68, 78, 175).

III.

BRIEF OF ANSWERING ARGUMENT

This summary parallels pages 18-27 of our brief.

Answer to Point No. 1

Appellant contends that appellee is not entitled to recover under the undisputed evidence. This is argued under eight heads. None of the arguments are supported by authority in point. We shall discuss each in turn.

A. Appellant contends tariff 51 is not subject to construction. We contend (Br. 19):

(1). That it is under the law of Washington. The Department charged with the duty of determining the meaning of the tariff found after evidence that the term board measure was a trade term, and the Supreme Court agreed that the Department's action was lawful and reasonable. Rem. Rev. Stat. 10450, 10448; *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691.

In this respect a tariff is like a statute and a construction thereof is part of the tariff. *Pennsylvania R. Co. v. International Coal Co.,* 230 U. S. 184, 197; *Marine National Exchange Bank v. Kalt-Zinmer Mfg. Co.,* 55 S. Ct. 226.

(2). The term "board measure" is a trade term in the logging industry, as shown by the evidence, and therefore subject to a showing of what the trade meaning of that term is. *Paepcke-Leicht Lumber Co. v. Talley,* 153 S. W. (Ark.) 833. See also *Union Wire Rope Corp v. Atchison, etc. Ry. Co.,* 66 F. (2d) 965.

B. Appellant contends the commercial interpretation fails to give effect to all terms of the tariff. We contend (Br. 19):

(1). That if board measure is a trade term, trade mean-

ing must be given to that term in accordance with the rule of law announced by the Supreme Court of Washington. (See Br. 17, 60-68, 78, 175).

The Washington court, in announcing the rule of law in that case, was acting judicially to determine the "reasonableness" and "lawfulness" of the findings and order.

> *Willapa Power Co. v. Public Service Commission,* 110 Wash. 193, 195; *Great Northern Railway Co. v. Department of Public Works,* 161 Wash. 29; *Bacon v. Rutland R. Co.,* 232 U. S. 134, 34 S. Ct. 283.

Having found that the rule as applied by the Department was in accordance with law, it necessarily followed that the Departmental application was not arbitrary.

(2). But in any event, the commercial interpretation of the term board measure does give effect to all terms of the tariff. The Northern Pacific's interpretation would read out of the tariff the term "board measure." Tariff 51, Item No. 50, dealing with scaling (App. Br. 3), which requires the shipper, where logs are not scaled by the carrier, to furnish the railway agent "a certificate showing the actual number of feet of logs on each car," means the actual number of feet of logs on each car for which freight charges are to be computed. We must therefore look to the column headed "Rates in Cents per Thousand Feet," intended by the carriers to comply with the Long-Woodworth agreement which uses the phrase "Rates in Cents per Thousand Feet Board Measure." (Tr. 23, 180). Item 40 deals with minimum loads of "6,000 feet board measure."

Appellant's interpretation would read out of tariff 51 the trade term board measure, whereas department's interpretation gives effect thereto and reasonable effect to Item 50.

C. Appellant contends the parties by practical construction have accepted the Northern Pacific scale, and

that it is the conclusive and governing scale. We contend, (Br. 19):

(1). If tariff 51 calls for a commercial scale, the practical construction of the parties is irrelevant.

(2). However, the evidence shows no such practical construction, not only because tariff 51 was filed for the first time on October 1, 1925, but also because practical construction of that tariff was not uniform on the part of the carriers themselves. It was a joint tariff and the Milwaukee and Great Northern railways parties to that tariff, construed it as calling for the commercial scale. Furthermore, even if the construction were uniform on the part of the carriers, it would be ineffective unless acquiesced in by the shippers, as shown by the authorities cited in appellant's brief 147-154. The evidence shows no such acquiescence. On the contrary, the evidence shows that the shipper on the other carriers received the benefit of the commercial scale, and the Sauk River Lumber Company did not even know that the Northern Pacific was construing tariff 51 the way it did until after the year 1926, when it promptly brought suit before the Department. (Br. 89).

(3). Furthermore, the Northern Pacific's practical construction is ineffective because it would result in discrimination under the same joint tariff, since shippers on the Northern Pacific would get one kind of treatment and shippers on the other carriers would get more favorable treatment. See, Rem. Rev. Stat. 10354, 10356.

(4). In any event, practical construction by one party to the tariff would at most be merely an aid to interpretation, and would not require dismissal of this suit as appellant's own authorities show, (App. Br. p. 152).

D. Appellant contends the commercial interpretation makes tariff 51 illegal in that it permits confiscation, discrimination and free carriage. We contend (Br. 20):

(1). That the carrier takes the risk of interpretation of

a voluntarily filed tariff. See *Pennsylvania Fire Insurance Co. v. Gold Issue, etc. Co.,* 243 U. S. 93, 37 S. Ct. 344. And since the rule is that ambiguous terms in a tariff should be interpreted in their commercially understood sense, the objection raised is unavailing as to a voluntarily filed tariff.

(2). In any event, the question of the sufficiency of rates is irrelevant in this reparation proceeding. *Northern Pacific Ry. Co. v. Sauk River Lumber Co.,* 160 Wash. 691; *State ex rel v. Department of Public Works,* 149 Wash. 129, 134; *Robinson v. Wolverton Auto Bus Co.,* 163 Wash. 160, 163; *Tonopah Sewer & Drainage Co. v. Nye County,* 254 Pac. (Nev.) 696; *Mellon v. Johnson Co.,* 219 N. W. (Wis.) 352, 353.

(3). Furthermore, evidence as to the effect of the commercial interpretation on the Northern Pacific alone, without being coupled with an offer to show that the same is true as to other party carriers to tariff 51, would be inadmissible because even if it were true as to Northern Pacific and not shown to be true as to the others, the Northern Pacific would not be entitled to one kind of scaling practice under tariff 51, while the other carriers were required to use another, since the tariff is joint and not several, and means the same for all parties to it.

(4). In any event, there is no discrimination resulting from the commercial scale, on the theory that different commercial scales are used in different logging districts, (Br. 97). The evidence is that the commercial method of making deductions is the same in all districts. The only difference in the districts is the method of measuring the gross content, which methods result in a small difference, (Br. 4-6). The commercial method of interpreting tariff 51 involves the uniform use of the Scribner Decimal "C" Stick. Hence the carrier will use the same stick in all the logging districts, and the same deductions will be made for the same defects in all the logging districts with the

result that there will be uniformity and not discrimination in the application of tariff 51, as held in *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691, (Br. 14).

(5). Finally, it is conclusively presumed in this proceeding that the rates are sufficient and that there is no free carriage in fact no matter what the form may be. It is not necessary to compute freight upon the basis of every item carried in order to constitute a full charge. It is sufficient, if freight is calculated on the basis of certain units in contemplation of the fact that it must be at a sufficiently high figure to cover other units that will not be counted for the purpose of assessing the total freight charge. (Br. 95). In fact, the so-called free carriage of cull logs is almost wholly offset by the pay the railway receives for minimum car loads, even in cases where the minimum is not loaded. Thus in the case at bar the shipper has paid to the carrier the sum of $3,671.78 to make up minimum for logs not shipped as compared with the sum of $4,069.73 which appellant contends should have been paid for cull logs.

E. Appellant contends the shipper has waived or is estopped to obtain reparation (Br. 20):

(1). Because appellee failed to call carrier's attention to the fact that it was using the wrong scale. But:

(a). This estoppel isn't pleaded, and therefore is unavailable. *Walker v. Baxter,* 6 Wash. 244.

(b). Nor is there any evidence to support this claimed estoppel, because the testimony is that the shipper did not know that the carrier was using any but the commercial scale. (Br. 7, 101).

(c). No such estoppel, at any rate, is available because the parties dealt at arm's length, both being charged with knowledge of the law. *Jordon v. Corbin Coals, Ltd.,* 162 Wash. 503; *Turner v. Spokane County,* 150 Wash. 524.

Just as a carrier is not estopped from insisting upon its filed rate even though it has charged less than that rate, as, for example, by misquoting the rate, (*Mellon v. Johnson Co.*, 219 N. W. (Wis.) 352), so it would seem that the same public policy requires that the shipper be not estopped from asserting the filed rate.

(2). Appellant predicates estoppel under the Long-Woodworth Agreement.

(a). However, there is no proof that that agreement provided for the Northern Pacific scale. On the contrary, the proof it that the scaling practices were not discussed and that Mr. Long did not even know of the Northern Pacific scaling practice, and must have assumed that the commercial scaling practice with which he was undoubtedly familiar and which was charged by the Chicago, Milwaukee would be the one that would govern. (Br. 115-117). Furthermore, the Great Northern and (by inference) other carriers used the commercial scale after the agreement and after tariff 51.

(b). In any event, however, that agreement, if different from the subsequently filed tariff 51, was avoided by that tariff becoming effective. Such an avoidance would necessarily be contemplated in the contract itself, since a carrier cannot by contract insist upon its terms contrary to subsequently filed tariff which, upon filing, becomes the govering tariff. *Armour Packing Co. v. United States,* 209 U. S. 56, 28 S. C. R. 428.

Such a voidable contract cannot be the basis of estoppel, not only because contract is not absolute but also because to utilize estoppel under such circumstances would be to give effect to the contract and not to the filed rate.

See *Melody v. Great Northern Ry. Co.,* 127 N. W. (S. D.) 543.

F. Appellant contends that the shipper cannot recover

unless the rates are unreasonable to the shipper's damage. We contend, however (Br. 21):

(1). That the Washington statutes do not require proof of damage other than that of overcharge. See R. R. S. 10433.

(2). Appellant's authorities deal not with overcharge cases, but with reparation suits involving the violation of the long and short haul provisions of the I. C. C. and the statutes forbidding discrimination. In overcharge cases, it is necessary to prove only the fact of overcharge and nothing else. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,* 245 U. S. 531, 38 S. Ct. 186; *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.,* 269 U. S. 17, 46 S. Ct. 73, 79.

G. 1. Appellant contends that its unpublished scaling rules are binding, but we contend (Br. 21):

(1). That such unpublished scaling rules are ineffective to change the meaning of board measure, which is published in a tariff. If board measure means something other than its commercial meaning, the carrier must publish that meaning.

(2). An unpublished scaling rule, however, is void. (R. R. S. 10350, 10354). *Clark v. Southern Railway Co.,* 119 N. E. (Ind.) 539, 542; *Vanderberg v. Detroit & C. Nav. Co.,* 186 N. W. (Mich.) 477, 478; *Macfadden v. Alabama Great Southern R. Co.,* 241 F. 562; *Suffern Hunt & Co. v. Indiana, Decatur & Western R Co.* 7 I. C. C. 255; *In re Alleged Unlawful Charges,* 8 I. C. C. 585.

(3). The Northern Pacific's unpublished scaling rules would not be binding unless there was proof that the other carrier parties to the tariff used the same unpublished scaling rules. Thus the evidence shows that they use the commercial scaling method. The tariff being *joint,* it would be improper to permit the Northern Pacific to apply one scale and the other carriers to apply a different scale.

(4). Finally, the unpublished scaling rule being contrary to the meaning of board measure, would naturally be ineffective since contrary to the filed tariff.

G. 2. Apellant finally contends that its unpublished scaling rules are binding under the administrative construction of the statutes, (Rem. Rev. Stat. 10350-10354, requiring rules to be published). In addition to the matters heretofore urged as making the unpublished scaling rules of the Northern Pacific ineffective, we also urge (Br. 22) that there is no evidence or sufficient offer of evidence to show such administrative construction, since joint tariff 51 was the first effective tariff using the term board measure, and it was filed October 1, 1925. There is no showing in the record that the Department ever acquiesced in the propriety of the practice of not filing scaling rules so far as *all* the carriers were concerned. (See Br. 8 and 88.) In any event even if there were such an administrative construction, it would be ineffective in face of the Washington statutes requiring the carrier to file with the commission schedules, including "any rules and regulations which may, in any wise, change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the * * * shipper * * *" To permit administrative construction to override the plain language of the statute would be to permit a subordinate body to override legislation.

Answer to Point No. 2

Appellant contends that the findings and order are inadmissible in whole or in part. We contend, however (Br. 22):

A. That the Supreme Court of Washington in the case of *Northern Pacific Railway Co. v. Sauk River Lumber Co.*, 160 Wash. 691, conclusively determined that the order was supported by the findings, and that determination is not open to the collateral attack that the order is not supported by the findings (Br. 15). See *Willapa Power Co. v. Public Service Commission*, 110 Wash. 193, 195; *S. D.*

Warren Co. v. Maine Central R. Co., 135 Atl. (Me.) 526; *Public Service Commission v. City of Indianapolis,* 137 N. E. (Ind.) 705; *Great Northern Railway Co. v. Department of Public Works,* 161 Wash. 29.

B. Items to which objection are made are not improper. Assignments of error 5 to 21, inclusive, are based upon the contention that the matters referred to were merely contentions, and therefor not findings admissible in evidence. But the findings and order must be construed as a whole, and when it is remembered that the Department accepted the shipper's contentions and in findings numbered 23 to 25 expressly found the facts as alleged, it is clear that the so-called contentions are more than mere contentions, and *by virtue of paragraphs 23 to 25 become findings,* and therefore admissible. Furthermore, as appears from the case of *Great Northern Railway Co. v. Department of Public Works,* 161 Wash. 29, 32, it is not objectionable that the contentions of the parties or the arguments used by them may be stated in the findings, and as long as they are separable it becomes a simple matter to instruct the jury as to what shall be considered *prima facie* evidence. Furthermore, if included in the findings are statements of the law, if the law thus stated is the correct and applicable law, no prejudicial error can result. See *Gallagher v. Town of Buckley,* 31 Wash. 380.

C. In any event, it is proper to permit the whole findings and order in evidence and to state the effect thereof to the jury in the court instructions. Even appellant's own cases make that plain. (See Br. 73-75). In this case, the court instructed the jury, both at the time that the findings and order were admitted (Tr. 104) and in his charge to the jury (Tr. 316-318), stating:

> "You will note that it is 'the facts therein stated' not the liability of the defendant, of which the findings and order are to constitute prima facie evidence; and 'the facts therein stated' do not include mere recitations of contentions put forth by the parties, nor

statements, comments or opinions of the Department of Public Works as to the law applicable to the issues in this case, or as to any other matter not of a factual nature. You are not to consider anything contended in those findings and order except the facts therein stated.

"It is my duty to instruct you as to the law applicable in this case, and it is your duty to accept the law as stated in these instructions."

The trial court properly exercised its discretion in instructing in its own language what the law as to these finding and order was. It was not bound to instruct in the language proposed by appellant. *Stanhope v. Strang,* 140 Wash. 693.

Answer to Point No. 3

Appellant contends that evidence as to other carriers' scaling ractices was inadmissible; but we contend (Br. 23) it was proper to rebut Mr. Long's testimony offered by the carrier. Mr. Long had testified that the Long-Woodworth agreement was drawn on the theory that everything would exist as it had been in the past on the part of the shippers in the way of scaling, and that the theory was that the scaling method was settled and uniformly applicable to all the railroads. (App. Br. 145). Appellee merely sought to explain what Mr. Long meant by his testimony as to the practice of the shippers in the past in the way of scaling, and as to the scaling method that was settled and uniformly applicable to all the railroads. Furthermore, the testimony was admissible to rebut appellant's evidence of uniform practical construction, and the claimed unambiguous meaning of board measure, which had been insisted upon by the appellant. The trial court, in permitting this rebuttal testimony, did not abuse its discretion. See *Kelley v. Department of Labor & Industries,* 172 Wash. 525, 529.

The testimony of the Milwaukee practice from 1913 to 1919 and 1920 to 1922 was not remote especially when the Northern Pacific testimony as to scaling practices went back

to 1906. There would naturally be the presumption of the Milwaukee scaling practices continuing. Furthermore, as to the Great Northern, the testimony of the scaling was for some period prior to the Long-Woodworth agreement and tariff 51, and until that was superseded. Clearly, the Great Northern practice would show the construction that the carriers themselves placed upon tariff 51 and also upon the Long-Woodworth agreement. Furthermore, the form of the competing carrier's tariffs would be immaterial since Mr. Long did not testify that the *warranted* scaling practices were to continue, but only that the shipper's scaling practices were to continue. (Br. 146, 147). Appellant was accorded full opportunity to rebut and to explain away the fact as to the scaling practices of other carriers, but though informed that it would have that opportunity on three different occasions, it did not attempt to do so. (Br. 147-148).

Answer to Point No. 4

Appellant complains of a number of instructions which are classified under certain headings (Br. 23). We have already pointed out that the court's instructions on the effect of findings and order were proper. Appellant contends, however, that the court permitted the jury to weigh as evidence the findings of the Department, despite contradicting testimony, and that this was improper. In other words, appellant seeks to treat the findings and order as though they constitute a presumption of law based on common experience and inherent probability. But even such presumptions may, according to many descisions, including the latest one in Washington, be treated as the fact, unless the testimony used to overcome it be believed as credible by the jury. That is the most that it can be claimed the court's instructions permitted the jury to do (Br. 163). *Karp v. Herder,* 81 Wash. Dec. 511; *Mutual Life Insurance Co. v. Maddox,* 128 So (Ala.) 383; *New York Life Insurance Co. v. Beason,* 155 So. (Ala.) 530; *Eiseman v. Austen,*

169 Atl. (Me.) 162; *Maxey v. Railey & Bros. Banking Co.*, 57 S. W. (2d) (Mo.) 1091.

In any event, we are not here dealing with a presumption of law, we are dealing with statute which makes findings and order *prima facie evidence,* and which permits such findings and order to be reviewed judicially. Under such circumstances, the legislative intention may well be deemed to be different from that of a common law presumption, and may well be deemed to intend that such findings and order shall be weighed as evidence even against contradicting evidence. It is purely a question of legislative intent. See *O'Dea v. Amodeo,* 170 Alt. (Conn.) 486.

It is entirely reasonable to believe that the legislature intended to give greater effect to findings and order subject to judicial review than it would give to an ordinary presumption of law.

In this connection, we call attention to the fact that no case cited by appellant decides whether the statute providing that findings and order shall constitute *prima facie* evidence of the facts stated is a presumption of law or a presumption of fact. If a presumption of fact, obviously the presumption, i. e. inference, may be weighed as evidence.

Furthermore, the instruction given by the trial court, even if the law were to the effect that the findings and order cannot be weighed, called attention to the right of the jury to weigh the findings as evidence as against contradictory evidence only by inference, and the error, if that be error, was not prejudical.

See *McMullen v. Warren Motor Co.,* 174 Wash. 454, decided before *Karp v. Herder,* 81 Wash. Dec. 511.

B. Appellant complains of certain matters connected with the Supreme Court decision. The action of the Supreme Court in reinstating the findings and order was pleaded in the supplemental complaint, and admitted in the answer and supplemental answer. (Br. 154). It was

therefore in evidence, since it is unnecessary to prove matters admitted in the pleadings. 62 C. J. 112; *Schwede v. Hemrich,* 29 Wash. 124; *Johnson v. Anderson,* 61 Wash. 100.

Being in evidence, it was a proper subject of comment, subject to the instruction of the court that the findings and order were not *prima facie* evidence of the liability of the defendant, which instruction the court gave. (Tr. 317).

C. The trial court refused a number of appellant's requested instructions, setting out rules for the interpretation of tariff 51 other than the rule that ambiguities must be construed in its commercial sense. We have already pointed out that the rule in Washington to which the court gave effect in its instruction to the jury was that ambiguities must be interpreted in their commercially understood sense. That was the only proper rule for the court to instruct the jury upon, since as appellant itself contends, the construction of the tariff was a question of law for the court.

D. Miscellaneous instructions given by the court are the subject of complaint by appellant. It is contended that certain instructions were contradictory in that the court instructed that it was for the jury to determine what was the proper method of scaling logs, and also instructed that ambiguities must be interpreted in their commercial sense. But there is no contradiction between telling the jury that ambiguities must be interpreted in their commercial sense, and also telling the jury that it is for the jury to determine what the commercial sense was. (Br. 176). Appellant complains of an instruction to the effect that if the jury found the method accepted commercially resulted in the carriage of some logs without compensation, that fact would make no difference. But as already pointed out, it must be conclusively presumed in this case that free carriage in form is not really free in fact, and that it is im-

material in this case that the application of the commercial method would seem to involve free carriage.

Appellant complains of the refusal of the court to give certain instructions dealing with protest and rules of tolerance. But there was no evidence to warrant the proposed instructions, and those given by the court were even more favorable to appellant than it was entitled to receive. (Br. 24).

Space limitations prohibit elaboration here of these matters dealing with instructions, but reference is made to our brief, p. 24, which indexes the more detailed discussion.

Answer to Point No. 5

Appellant contends that the striking of all pleading and evidence as to estoppel and counter-claim was improper. We contend (Br. 24) that the court properly struck the counter-claim whereby appellant sought judgment against appellee for refunds made under the Long-Woodworth agreement. There was no evidence proving any breach on the part of appellee of the Long-Woodworth agreement so as to be the basis of rescission, damages, or the imposition of equitable conditions. There is no evidence whatsoever that the Sauk River Lumber Company ever agreed to abide by the Northern Pacific scaling rules in the Long-Woodworth agreement or any place else. On the contrary, the evidence is that the shipper, as well as other shippers and other carriers, assumed that the commercial scaling practice would govern. There is, therefore, no basis in fact for any claimed breach of that agreement. Furthermore, there could be no rescission by one party after full performance of the obligations of the parties under the contract (especially under a joint contract). The appellee, as well as other carriers and the Department, abandoned any further fight against the carriers on the question of rates. The Department dismissed its proposed penalty suit which it had directed to be instigated against the carriers

for charging freight under suspended tariff 29. The carriers made refunds of freight charges unlawfully exacted under suspended tariff 29 from June 1, 1925, to October 1, 1925. Hence there was full performance of the obligations of all parties on all sides. Under such circumstances there could be no rescission. See *Cowley v. Northern Pacific Ry. Co.,* 68 Wash. 558; *Southern Pacific Ry. Co. v. Frye & Bruhn,* 82 Wash. 9.

Furthermore, there being no ground for equitable jurisdiction, there can be no relief by way of the imposition of equitable conditions. *Blue Point Oyster Co. v. Haagenson,* 209 Fed. 278.

B. Nor can the Long-Woodworth agreement furnish the basis of an estoppel. In the first place, the removal of the Long-Woodworth agreement as an estoppel defense at the time of the court's instructions to the jury was not excepted to, and of course no exception allowed. It would, therefore, seem that since no complaint can be made of the failure to submit the issue to the jury, no error can be claimed for the trial court's refusal to submit an instruction on a matter not in issue. In any event, as has heretofore been pointed out, the Long-Woodworth agreement could not be the basis of an estoppel in fact, (since the Northern Pacific scale was not agreed to) or in law, (since the provisions of a contract must yield to a tariff thereafter filed, if said stariff is different from the pre-existing contract).

Answer to Point No. 6

Appellant contends the court erred in not giving effect to the principle that free carriage is illegal. We have heretofore pointed out that it is conclusively presumed in this proceeding that there is no free carriage in fact and that therefore in this proceeding, as distinguished from a rate hearing, the question is irrelevant. (Br. 25). *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160

Wash. 691; *State ex rel v. Department of Public Works,* 149 Wash. 129, 134; *Robinson v. Wolverton Auto Bus Co.,* 163 Wash. 160, 163; *Tonopah Sewer & Drainage Co. v. Nye County,* 254 Pac. (Nev.) 696; *Mellon v. Johnson Co.,* 219 N. W. (Wis.) 352, 353.

Answer to Point No. 7

Appellant contends that the plantiff's witness should not have been permitted to give his conclusion as to evidence before the Department of Public Works, but that testimony did not constitute an inadmissible conclusion. (Br. 25). *State v. Maxwell,* 1 N. W. (Iowa) 666.

Furtheremore, appellant was not prejudiced, since it brought out other testimony seeking to contradict that given by appellee's witness. (Br. 152, 153).

Answer to Point No. 8

Appellant contends that the Department's order is not final so that the plaintiff's case should be dismissed. (Br. 26). We contend that the motion to dismiss for lack of jurisdiction does not raise this question—that the proper way to raise the question is by demurrer for insufficient facts. Furthermore, the order reasonably considered clearly and finally fixes the amount of the overcharge and directs its payment. Findings 9 and 10, coupled with findings 23 to 25, clearly show that the shipper paid freight charges amounting to $188,784.55 during 1926; that it should have paid $179,501.92, resulting in the difference, both alleged and found, of $9,282.63. The order refers to the findings of fact and makes them a part of the order, and directs payment as reparation of all sums in excess of $179,501.92, together with interest. Except, then, but for the second paragraph of the order, there could be no question that the order was so far final as to permit a plenary suit to recover the amount thereof. The second paragraph of the order

referred to purports to retain jurisdiction for the purpose of entering a further order fixing the amount of reparation. But that paragraph, if it is anything more than surplusage, simply means that if the amount of reparation is in any sum other than that theretofore found, that the parties get together or else permit the Department to determine the amount other than that already found.

At most, this paragraph creates ambiguity, which ambiguity can best be resolved by looking to the way the parties themselves and the Supreme Court of Washington treated the order. The Supreme Court of Washington stated the effect of the findings and order in the following language, (Br. 12):

> "During the year 1926 the logging company shipped logs for which it paid the railroad company freight in the sum of $188,784.55. Believing that it had been overcharged, it filed an application with the Department of Public Works for a refund. Upon the hearing, the Department found that all payments in exces of $179,501.92 were excessive, making the overcharge $9,282.63."

The court further said:

> "As to the amount of recovery, this is based upon the calculations of a rate and traffic expert, and it appears to us to be substantially accurate."

The court's interpretation of the Departmental findings and order would seem to be not only highly persuasive but conclusive. See *Arizona Wholesale Grocery Co. v. Southern Pac. Co.,* 68 Fed. (2d) 601, C. C. A. 9th.

Furthermore, the appellant, in its petition for removal, treated the Departmental action as an order made by the Department that "petitioner pay to the Department of Public Works the sum of $9,282.63 on account of reparation for alleged overcharge." Judge Neterer himself, in his memorandum decision denying appellee's motion to re-

mand, pointed out that the jurisdiction of the Department of Public Works had been exhausted apparently on the theory that a final order had been entered. Judge Bowen likewise concurred in denying appellant's motion to dismiss. After nearly seven years of litigation, when everyone connected with the case had treated the Departmental order as final, the carrier suddenly and shortly before trial argues that it is not final and that the case should be returned to the Department of Public Works for the purpost of entering a final order. But what could the Department do that it has not already done? It could enter an order that the carrier repay overcharges in the sum of $9,282.63, a sum which it has already ordered to be repaid. It would be useless, therefore, to sacrifice form to substance and contend that despite its determination of the amount of the overcharge and despite its direction to the carrier that it repay the amount of its overcharge, that the order is not final for purposes of a plenary suit. See *State ex rel G. N. Ry. Co. v. Public Service Commission,* 76 Wash. 625.

Answer to Point No. 9

Appellant contends that the Departmental order is void because under the 1921 act the Department is entitled to a 10% fee. We contend (Br. 26):

A. That the 1921 act is not applicable to this proceeding, so as to involve the application of the 10% charge, because that charge is payable, if at all, only if refunds are collected by the Department, not merely if the award is made. (R. R. S. 10435, 10436). Where the award is sued on under the procedure provided by the 1911 act as is permitted by the 1921 act, the 10% statute is not applicable. (Laws of '21, p, 337, § 6). Furthermore, the statute is inapplicable because no judgment has been entered, that being a discretionary matter. (R. R. S. 10435). *Tacoma Grain Co. v. V. P. Ry. Co.,* 123 Wash. 664

Indeed, it is doubtful if the Director could constitutionally enter judgment on its reparation award See *Tacoma Grain Co. v. V. P. Ry. Co., supra,* p. 668.

In this connection, appellant's counsel has advised us that in his summarizing brief he refers to a cause in equity instituted by the state ex rel the Department (since this appeal was argued) against the carrier and shipper, requesting the District Court to direct payment of the judgment in this cause to the plaintiff for disbursement to the shipper, the state retaining 10% of the judgment for overcharge. That the Department, through the state, has no right to the judgment or 10% appears evident from the fact that the District Court on September 28th dismissed the bill of complaint, stating he did so on each ground assigned by the shipper. One of the grounds urged was that heretofore argued, namely, that the 10% is not payable if the shipper rather than the Department obtains the judgment and collects the overcharge. The carrier, therefore, has not been prejudiced by the absence of the Department as a party plaintiff.

B. In any event, the Department's pecuniary interest, even if the 10% statute is applicable, is indirect and remote, and therefore permissible. *Dugan v. State of Ohio,* 277 U. S. 61, 48 Sup. Ct. 439; *Bevan v. Krieger,* 289 U. S. 459, 53 S. Ct. 661.

C. Furthermore, the Departmental pecuniary interest does not invalidate the order because a judicial review and a subsequent *de novo* trial is permitted. *Bevan v. Krieger,* 289 U. S. 459; *Hill v. State,* 298 S. W. (Ark.) 321; *Brooks v. Town of Potomac,* 141 S. E. (Va.) 249.

Furthermore, the *Northern Pacific Railway Co. v. Sauk River Lumber Co.* case in which this point was urged by appellant, was apparently rejected as not a controlling point.

Answer to Point No. 10

Appellant contends that the shipper cannot recover because the Department is a necessary party, and until it appears to permit the shipper to recover would be to split a cause of action. We contend (Br. 26):

A. That since this point was made for the first time at the time of trial, was not made by demurrer or set up in its answer or supplemental answer, the point was waived. (R. R. S. § 263); *Dryden v. Sewell,* 2 Alaska 182; *Flanagan v. Drainage Dist. No.* 17, 2 S. W. (2d) (Ark.) 70; *Bignold v. Carr,* 24 Wash. 413; *Baxter v. Scoland* 2 Wash. Ter. 86.

B. In any event, the shipper may sue as the real party in interest, so the Department is not a necessary party. (R. R. S. § 179); *American Surety Company of New York v. Scott,* 63 Fed. (2d) 961, (C. C. A. 10th); *U. S. v. Skinner & Eddy Corp.,* 5 F. (2d) 708, 28 Fed. (2d) 373, 35 Fed. (2d) 889; 13 A. L. R. 288.

In other words, even though paper title to the award may be in the Department, the real party in interest may sue to recover it. See *Stotts v. Puget Sound Traction, Light & Power Co.,* 94 Wash. 339.

The order merely *recognizes* (a condition precedent) but *does not create* the pre-existing shipper's right to reparation.

If the appellant deemed the presence of the Department necessary to a determination of this litigation, it would have brought the Department in as an additional party in this case under the provision of R. R. S. § 196. Simpkin's Federal Practice (Rev. Ed.) § 25, p. 27.

Appellant's only complaint as to the absence of the Department is that it might be the subject of successful suit by the Department for the same award. But obviously, if the shipper recovers as real party in interest, the De-

partment cannot successfully sue to recover the same claim. A recovery by the real party in interest is a bar.

47 C. J. 34; *Blaser v. Fleck,* 189 Pac. (Ore.) 637, 638.

There were sufficient parties before the court to permit appellant to interpose all its defenses, and no injustice was done to the appellant by reason of the absence of the Department. Hence no legal prejudice can result. See *Davison v. Rake,* 16 Atl. (N. J.) 227, affirmed 18 Atl (N. J.) 752.

Furthermore, the Department isn't entitled to the 10%. See answer to Point 9-A.

C. It follows that there is no splitting of a cause of action involved. The real party in interest recovers the whole amount. If it owes the money to the Department, that is not a matter with which the carrier has any concern since a recovery by the real party in interest bars recovery by anyone else, and the carrier's concern is at an end. See *Harris v. Johnson,* 75 Wash. 291.

The foregoing summary of appellee's answering contentions does not exhaust the subject matter of the brief, but is intended merely to present a bird's eye picture of those contentions, which contentions are more fully developed in the brief itself under the various assignments of error. It will be noted, too, that the summary follows the order of the summary printed on pp. 18 to 27 of appellee's brief. Whenever, therefore, it becomes desirable to study any particular contention in detail, it will be possible by turning to that summary and to the pages indicated therein to get a detailed discussion of the various contentions.

It is respectfully submitted that in view of the fact that tariff 51 is a joint tariff applicable to all carriers and shippers alike, and in view of the fact that the Northern Pacific is urging an interpretation of board measure followed by no one except itself, and directly contrary to the

interpretation followed by other carrier parties to the same tariff, that in substance the Northern Pacific is asking for a discrimination against its shippers and a special privilege for itself, to which it is not entitled. It is respectfully submitted that the judgment of the trial court as against appellant's appeal should be affirmed.

Respectfully submitted,

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